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Editor's Note

This issue of *The Grey Area* deals with civil liability. As an educational institution, employer, owner of public buildings and liquor permit holder, important obligations are imposed by law on the University. Its administrators and employees fulfill these obligations on its behalf. Furthermore, in certain circumstances, failure to meet these obligations may give rise to personal liability on the part of administrators and employees.

In this issue, we will analyze the legal framework of civil liability and, particularly, the civil liability régime which flows from the *Civil Code of Québec*.

We will also cover the most significant features of the new *Civil Code* pertaining to civil liability. Indeed, this Code, adopted by the National Assembly on December 18th, 1991, will be in force as of January 1st, 1994.

Furthermore, we will discuss some of the specific duties imposed on an administrator of a corporation as well as the applicability of the principle of due diligence in light of the *Bata* decision. Finally, we will analyze the University's insurance policies and their respective coverage.

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Civil liability is a matter governed by the Civil Code of Québec, which regulates private relationships. However, other statutes impose liability on the University, its administrators or employees. The following is a brief analysis of the legal framework of civil liability.

The *Civil Code of Québec* expresses general principles of civil liability in Québec law. It states the essential conditions for the existence of civil liability and establishes certain presumptions of fault such as the one imposed on an employer for damage caused by its employees.

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The Occupational Health and Safety Act imposes certain rights and obligations on employers as well as employees in order to ensure the quality of the work environment and to safeguard the health of employees. Under this Act, any moral or physical person (i.e., corporate body or individual) may be sued if this person contravenes its provisions. The Act expressly states that when a corporation has committed an infraction, any administrator, director, officer or employee who has ordered, authorized or consented to the infringement is presumed to have participated in this illegal action and, therefore, may be personally sued, regardless of whether the corporation has been sued and found guilty or not guilty.

Regulations Respecting Information on Hazardous Materials establish a labelling system for hazardous materials and set out obligations related to training and information programmes.

Regulations Respecting Industrial and Commercial Establishments. Quality of air, ventilation, heating, heat stress, lighting, noise, sanitary standards and concentration of gases, dusts, fumes, vapours or mists in a work environment are all matters governed by these regulations.

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The Public Safety Act imposes safety obligations on owners and occupants of public buildings.

Regulations Respecting Safety in Public Buildings deal with all aspects of the physical safety of a building such as maintenance, emergency exits, fire resistance, fire protection, emergency lighting and elevators.

The purpose of the Environmental Quality Act is to protect the quality of the environment, to promote its decontamination and to protect all living species. Under this Act, any moral or physical person may be sued for causing or permitting the unlawful discharge of contaminants into the natural environment or otherwise contravening the Act or its regulations.

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The Liquor Permits Act determines the conditions governing the issuance and exploitation of liquor permits. In its capacity as a permit holder, the University must comply with the obligations set out in this Act such as those related to the posting of alcohol price lists, the hours and days of use of the permit, and the records that a permit holder must maintain.

Regulations Respecting Lay-out Standards for Establishments. Among other matters, these regulations deal with the capacity and security standards of an establishment.

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The Act Respecting Offences related to Alcoholic Beverages regulates the serving of alcohol on a permit holder's premises. For example, a permit holder must not serve alcohol to a person in a state of inebriety or to a person who the permit holder knows is buying alcohol for another person who is obviously under the influence of alcohol.

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The Québec Charter of Rights and Freedoms notably prohibits discrimination based on race, national or ethnic origin, colour, religion, sex, age or disability. It also prohibits harassment on these grounds. In the case of unlawful interference with any right or freedom recognized by the Charter, a victim is entitled to obtain compensation for the moral or material prejudice that he or she has suffered. The victim is also entitled to obtain punitive damages if the Human Rights Tribunal concludes that this interference was intentional. In Québec law, this is the only ground on which punitive damages may be obtained.

Administrators' Duties

Civil law and corporate law impose specific duties on administrators. They may be summarized as follows:

Impartiality. Administrators shall be impartial. Their decisions must be made in the best interest of the corporation only, regardless of any personal interest or that of a third party.

Independence. Administrators shall act with independence and loyalty. They shall act on their own behalf and not on behalf of the group, as the case may be, which has nominated them.

Honesty and good faith. Their decisions shall be made in good faith. Administrators shall avoid placing themselves in any situation where their personal interest or that of a third party would be in conflict with their obligations.

Prudence and diligence. Administrators shall act with prudence and diligence. They shall have the necessary skills to understand matters on which decisions have to be taken and, if necessary, shall require expert advice.

QUESTIONS & ANSWERS

Q: When doses civil liability arise?

A: Four conditions must be present, i.e, the capacity of a person to discern right from wrong, a fault, a damage and a causal link between a fault and a damage.

Q: Is there a difference between a moral person and a physical person with respect to civil liability?

A: No. In civil law, there is no distinction between a corporate body and an individual and, therefore, a corporation may be held liable for damages caused by its administrative units, directors, officers or employees in the performance of their duties.

Q: How can the concept of fault be defined?

A: A fault is an action or a mode of behaviour that is contrary to an express provision of the law or that does not meet the standards of care required by the courts in similar circumstances.

Q: What kind of damages may give rise to civil liability?

A: Any physical or material damages caused to a person. Furthermore, the new *Civil Code of Québec* expressly recognizes moral damages, a concept which has been developed by the courts.

Q: Is there a difference between civil liability and contractual liability?

A: Both are civil liabilities pursuant to the *Civil Code of Québec*. However, the first arises from the violation of an obligation imposed on a person by law, while the second arises from those imposed by contract.

Q: Can a person only be held liable for a fault that he or she has personally committed?

A: No. A person may also be held liable for damages caused by another person or by things in his or her custody.

Q: Who can be held liable for a fault committed by another person?

A: **A person having parental authority.** A person may be held liable for the damages caused by a minor under his or her authority. Since the *Civil Code* establishes a presumption of fault against this person, the only defence would be to prove that he or she did not commit any fault with respect to the custody, supervision or education of the minor; that the minor has not committed a fault; that the damage resulted from the victim's fault or from a third party's fault; or that the damage has been caused by a fortuitous event or an "act of God" or *force majeure*.

An employer. An employer may be held liable for damages caused by one of its employees in the performance of the work for which he or she is employed or any person who is, like a volunteer, in a "master-servant" relationship with the employer. The only defence would consist of establishing that a fault has not been committed; that the damage resulted from the victim's fault or from a third party's fault; that the damage has been caused by a fortuitous event; or that the fault has been committed outside the scope of the performance of the employee's duties.

Q: Who may be held liable for the damage caused by things in their custody?

A: Any person is liable for damage caused by a thing or things in his or her custody, unless no fault has been committed. The Code specifies certain persons who may be liable: the owner of an animal or a person making use of the animal; the owner of a building for damage caused by its collapse, resulting from lack of repair or from a building defect.

Q: Can a manufacturer be held liable for damages caused by reason of a defect in a product?

A: Yes. The courts have recognized the responsibility of manufacturers for damages caused by their products. This responsibility is expressly recognized by the new *Civil Code* and extends to distributors and suppliers, whether wholesalers or retailers, of a defective product.

A product is considered defective if it does not meet the safety requirements which a person is normally entitled to expect, by reason of a defect in the design or manufacture of the product, its poor preservation or presentation, or a lack of sufficient indications as to the risks and dangers it involves or as to safety precautions.

However, the manufacturer, distributor or supplier of a product may not be held liable for injuries caused by a defect in a product if they can prove that the victim knew or could have known of the defect or could have foreseen the injuries. Nor may they be held liable if they can prove that the existence of the defect could not have been identified at the time it was manufactured, or that they had not been neglectful in providing information upon becoming aware of the defect.

Q: What is a release of liability?

A: A release of liability is a contractual agreement between two parties, whereby one party agrees to release the other from liability under certain circumstances. The courts have recognized the validity of such a release. However, under the new *Civil Code of Québec*, a person cannot by way of contract or notice, exclude his or her liability for physical or moral damages caused to another person. Also, the new Code expressly recognizes the principle developed by the Courts whereby a person may not exclude or limit his or her liability for material damages caused to another person through an intentional or gross fault.

Q: What is the essential condition of validity for a notice which purports to limit liability for material damages?

A: Posted or not, this notice is effective and valid only if the party who invokes it proves that the other party was aware of it at the time the contract was formed.

Q: What is *force majeure* or "act of God" ?

A: They can be defined as unforeseeable and irresistible events. The law does not require a prudent and diligent person to foresee everything that might possibly happen, but only that which is sufficiently probable to happen.

The University protects itself and its employees from civil liability through liability insurance. The following is a brief analysis of the University's various insurance policies.

General Commercial Liability Policy

This policy covers claims for bodily injury, sickness or disease sustained by a person and caused by an accident that can be defined as a commission or omission which has unintended or unexpected results. This policy also covers medical expenses, property damages which occur by accident, as well as personal injury (ex: moral damages).

The main exclusions are:

- A bodily injury resulting from the use of reasonable force to protect persons or property
- A bodily injury to an employee of the University, arising from and in the course of his or her duties (covered by the *Industrial Accidents and Occupational Diseases Act*)
- An intentional fault
- A bodily or property damage arising from the ownership, use or operation of a vehicle.

Educational Institution Liability Policy

This policy covers claims which could result from a wrongful act committed by the University or one of its employees, which can be defined as an error or misleading statement or negligent act or omission or neglect or breach of duty.

The main exclusions are:

- Bodily injury, sickness or disease sustained by any person or property damage
- False arrest, libel, slander, defamation of character, invasion of privacy, wrongful dismissal, wrongful eviction, assault or battery
- Claims arising out of the discharge, dispersal, release or escape of pollutants (covered by the General Commercial Liability Policy).
- Liability imposed by or arising under the *Nuclear Liability Act.*

Umbrella Policy

This policy acts as an excess insurance coverage above the limit of the General Commercial Liability Policy ($1,000,000) up to $5,000,000 per occurrence.

Excess Policy

This policy acts as a second excess policy limit of the Umbrella policy up to a limit of $5,000,000 per occurrence.

Employee Benefit Program Liability Insurance

This policy covers any damage which could result from a wrongful act committed in the administration of the University's benefit program. For the purpose of this policy, administration means advice with respect to the program, its interpretation, handling of records, enrolment, termination or dismissal of employees under a program.

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All these policies impose the following duties on the University as the insured party:

- The duty to notify the insurer as soon as practicable of the reception of a written claim or of any occurrence which could result in a claim against the University
- The duty to cooperate with the insurer in its investigation
- The duty not to make any admissions of liability.

CASE-LAW

The Principle of Due Diligence.

In 1992, in the decision *Regina v. Bata Industries Ltd.*, the Ontario Court of Justice, Provincial Division, convicted this company for having caused and allowed a toxic discharge of toxic waste that could have impaired the quality of groundwater, thus contravening of the *Ontario Water Resources Act.* Furthermore, two of its directors were personally charged and convicted for having failed to take all reasonable care to prevent the corporation from causing or allowing the unlawful discharge.

In determining whether the accused directors had acted with due diligence, the Court set out some standards of conduct required from directors regarding environmental matters. These standards are as follows:

- Directors are responsible for reviewing environmental reports.
- They should ensure that the appropriate officers address environmental concerns brought to their attention by government agencies or other parties.
- They should be aware of the environmental standards that apply to the activities of the corporation.
- They should immediately and personally react when they receive notice that a breach of environmental standards has been discovered and that the system for addressing it has failed.

The Court stressed that the principle of due diligence varies depending on the authority and sphere of responsibility of a director or an officer. The more a director is in a position to prevent an offence, the more he or she is likely to be held personally accountable for its commission. Finally, the Court indicated that written documents are essential to establish and support a due diligence defence.

* * *

The *Bata* decision is a clear message to directors and officers of a corporation that they should take steps to be informed on the way their corporation complies with statutory obligations in the environmental health and safety area.

(Case discussed: *Regina v. Bata*, [1992] O.J. 236.)

Did you know that under the new Civil Code...

In certain circumstances, the disclosure of a trade secret may not give rise to the civil liability of the discloser.

Indeed, if the discloser can establish that considerations of general interest prevailed over keeping the secret, particularly for reasons of public health and safety, he or she is exempt from liability for damages caused to another person as a result of the disclosure.

A person who rescues or assists of another cannot be held liable for damages caused to this person.

A person who assists another is exempt from all liability for damages caused to the victim as a result of his or her assistance, unless the damages are due to an intentional or gross fault. This is also the case if a person disposes, of personal property for the benefit of another person, free of charge and for an unselfish motive.

The new Civil Code still permits anticipated assessment of damages in a contract.

The Code states that the parties to a contract may, through a penal clause, assess the anticipated damages that a debtor will have to pay as a penalty, should he or she fail to perform his or her contractual obligations.

This bulletin has been prepared for purposes of general information only. It must in no case be considered as a comprehensive study of the law nor an expression of opinion upon the matters reviewed in it. It would be advisable to consult with the Office of the Legal Counsel with respect to any question(s) concerning individual circumstances.

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